No. 21175 A-F
No. 22316

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In the Matter of

THE CALLAND CORPORATION,
a corporation,

Debtor and Appellant,

vs.

UNITED INSURANCE COMPANY
OF AMERICA,

WILLIAM N. BOWIE, JR.,

Appellees.

On Appeal From the United States District Court
Southern District of California, Central Division

BRIEF FOR APPELLEE UNITED INSURANCE COMPANY OF AMERICA

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I

PRELIMINARY STATEMENT

Of the seven appeals presented, appellee United Insurance Co. of America (hereinafter United) is interested in only two: the first appeal, which challenges the order of Referee Neukom

removing the restraint against United in its attempt to foreclose its Trust Deed, and the fifth appeal, which challenges Referee Neukom's order quieting title in United to the proceeds of a fire insurance company draft in payment of a loss which occurred on August 5, 1965 before the institution of the State Court receivership proceedings on August 21, 1965.

The first and fifth appeals will be discussed under separate headings. Appellant, in its seventh appeal seeks to involve United; however, we are satisfied that the only part of the seventh appeal that could touch United is res judicata. The situation is this: As pointed out in appellant's brief beginning on page 67, United filed an application with Referee Neukom on November 21, 1966 for an order to show cause for permission to include Trustee William Bowie as defendant in a quiet title action, which United intended to file. This came on for hearing on December 7, 1966; United's petition was granted, and Referee Neukom signed the written order December 21, 1966; appellant took a review, and on February 27, 1967 District Court Judge Irving Hill affirmed the referee's order. Appellant did not take an appeal from Judge Hill's affirmance and said order became final. On April 10, 1967 and after said order became final, appellant, by the stratagem of including all of the papers involved in the previous order to show cause sought to breathe new life into the now final order by making a motion before Referee Neukom requesting his

order directing the Trustee to appear and defend the quiet title action. When the referee denied this motion on May 3, 1967 and signed a written order May 18, 1967, appellant took a review, and on August 22, 1967 Judge Hill affirmed. It is the appeal from Judge Hill's affirmance that is now before this Court as the seventh appeal. In the seventh appeal appellant, in part, seeks to challenge the correctness of the original order granting United permission to join the Trustee as party defendant in the quiet title action. Whether or not Trustee Bowie should have appeared and defended the quiet title action is of no concern to United, because in fact he did not do so. That problem, if there is one, concerns the internal administration of the bankruptcy estate. What did concern United was securing permission to join the Trustee as a party defendant in the quiet title action. That permission was granted, the order was reviewed and affirmed by the District Court and became final. It seems too clear for argument that after once becoming final, the order cannot be reactivated and questioned in this Court by simply including the papers in a subsequent motion, and when that motion is denied, reviewed and affirmed, taking an appeal to this Court.

United will make no attempt to discuss each and every assignment of alleged error presented by appellant, but shall content itself (in accordance with Rule 18[3] of the Rules of this Court] in pointing out references to the record of

substantial evidence relied upon by United as supporting the crucial findings necessary to sustain the order appealed from. We are satisfied, following familiar rules of appellate procedure that United will be entitled to an affirmance of the first appeal if it points out substantial evidence justifying Referee Neukom in terminating the restraints against United in connection with its attempt to foreclose its Trust Deed. Similarly, United will be entitled to an affirmance of the fifth appeal if it points out substantial evidence that Referee Keukom was justified in quieting title in United to the fire loss draft. We believe that United is under no duty to undertake to justify local Rule 218 or any of the other peripheral points raised by appellant, such as the general duties of referees of the District Courts and of this Court in the handling of bankruptcy matters.

For convenience the Clerk's Transcript of the Record in appeals 21175-A-B-C-D-E will be abbreviated "Trans.," followed by the page and lines referred to. The various Reporter's Transcripts will be identified by the date of the hearing and abbreviated thus: "Rep. Tr. 12/29/64" followed by the page and lines referred to.

Before taking up the detailed discussion of the first and fifth appeals, we suggest that both appeals are moot and should be dismissed or affirmed on that ground alone. Admittedly the first appeal involves a restraint against a foreclosure sale

that has long since taken place; the fifth appeal involves the validity of turning over a fire loss draft that was turned over more than two years ago. Clearly the questions raised are moot and following familiar rules the first and fifth appeals should be dismissed on this ground alone. The discussion follows:

II

THE POINTS RAISED IN THE FIRST AND FIFTH APPEALS ARE MOOT, AND BOTH APPEALS SHOULD BE DISMISSED.

The first appeal challenges Referee Neukom's order of February 27, 1965 fixing March 4, 1965 as the day for the removal of all restraints against United in its attempt to foreclose its Trust Deed. One day before March 4, namely, on March 3, District Judge Thurmand Clarke signed an order restraining United until appellant's petition for review to the District Court could be heard. This stay order remained in effect until October 4, 1965 at which time District Court Judge Irving Hill affirmed Referee Neukom and terminated Judge Clarke's order but granted an additional 15 day stay to give appellant an opportunity to appeal and put up a stay bond pending appeal. No stay bond was put up; Title Insurance and Trust Company, the trustee under United's first Trust Deed held the foreclosure sale October 21, 1965, United bid the property in for

$725,000.00, took possession and operated the property. Thereafter, on November 2, 1965 appellant filed the first appeal, which has been designated as "appeal from order dated and entered October 4, 1965 and numbered 21175." In other words, the first appeal seeks to question the propriety of an order terminating the restraining order on a sale which has now taken place. This is a classic example of mootness.

The fifth appeal challenges Referee Neukom's order filed April 14, 1966 granting the petition of United for a turn-over order to a fire insurance company draft of $2,380.30 for a fire loss that occurred at Kon Tiki on August 5, 1964. While a review was taken from Referee Neukom's order (Judge Hill affirmed) no stay bond was put up. In accordance with the order, the draft was endorsed by the Trustee and turned over to United. The fifth appeal, in questioning the validity of the turn-over order is certainly moot in that the draft itself was turned over to United more than two years ago.

It should not require extended discussion or citation of authorities that a court has no power to make an order or a judgment that purports to decide moot or abstract questions.

Particularly in federal courts this is basic since the federal judicial power is, by the Constitution, restricted to "cases" or "controversies."

United States Constitution, Article III, §2;

Willing v. Chicago etc., Ass.'n., 277 U.S. 274;

Okla. City v. Dulick,
(CA Okla 1963) 318 Fed. 2d 830;

Nationwide etc. Co. v. Fidelity etc. Co.,
(CA Pa 1961) 286 Fed. 2d 91;

United States ex rel. Hoge v. Maroney,
(DC Pa. 1962) 211 Fed. S. 197.

Even the Supreme Court cannot do so.

Collins v. Porter,
328 U.S. 64 (1946).

One of the leading Federal cases establishing the rule that courts will not concern themselves with moot questions is Brill v. General Indus. Enterprises, (3 Cir.) 234 Fed. 2d 465. That case involved two actions by minority stockholders to enjoin the sale of a corporation's assets. On demurrer the actions were dismissed and immediately following the dismissal the sale of the corporation's assets was made. An appeal from the dismissal was taken the same day as the sale. In that case the appellee argued that the sale having taken place the appeal was moot and should be dismissed; the appellee stated:

"To hold otherwise would be to give this appeal for which no security analogous to an injunction bond has been posted, the practical effect of an injunction."

The 3rd Circuit agreed stating:

"It is well settled that the mere filing of an appeal, in the absence of a stay of proceedings, cannot operate as an injunction where none has been

granted by the Court below; otherwise stated, an appeal from a decree dismissing a complaint seeking an injunction, or refusing to grant an injunction, will not disturb the operative effect of such a decree, and when the act sought to be restrained has been performed, the appellate courts will deny review on the ground of mootness."

Brill then cites an impressive array of authorities both in the United States Supreme Court and in the Circuit Court. Also cited is a 1935 9th Circuit case, California Canning Peach Growers v. Myers, 78 Fed. 2d 194. That case was a petition to enjoin a hearing by a Department of the Federal Government in which the California Canning Peach Growers were involved. The petition for injunction was denied. An appeal was taken. Before the matter reached the 9th Circuit the hearing had been concluded. Held: moot and the appeal dismissed.

A case exactly in point involving the foreclosure of a Trust Deed is Bunn v. Werner (Dist. of Col. Cir. - 1954), 210 Fed. 2d 730. The Bunn case sought an injunction to restrain the foreclosure of real estate under a Trust Deed securing an alleged usurious note. At the time of filing the complaint the appellant requested a preliminary injunction against the foreclosure. This was denied and an appeal was taken to the Circuit Court. Before the case was heard in the

Circuit Court the Trust Deed had been foreclosed which fact was admitted by both counsel at the argument. The Court dismissed the appeal, so far as it related to the refusal to grant the preliminary injunction, on the ground that the appeal was moot, the foreclosure having taken place.

A Georgia case close to our facts is Allen v. Smith, (Ga., 1967), 154 S.E.2d 605. In that case appellant brought a petition to enjoin the sale of her property under power of sale in a deed to secure a debt. The trial court granted the restraining order and thereafter continued it in effect on condition that appellant pay $750.00 into Court and $250.00 per month thereafter and in the event payment was not made the restraining order was of no effect. After further hearings, the trial court sustained a general demurrer to the petition, an appeal was taken from that order and the order was reversed. The property owner then made a motion for summary judgment in the trial court and the defendant countered with a motion to dismiss on the ground that the matter was moot because the property had been sold after the appellant failed to make the payments due under the Court order. The trial court granted the motion and the property owner appealed. The Appellate Court held the appeal moot and affirmed the judgment of the lower court, stating that the appellee having acquired title to the property, it would be of no benefit to set aside the prior sale.

It would appear therefore that the first and fifth appeals involve only moot questions. If this Court cannot set aside the foreclosure sale (and there is certainly neither pleading nor evidence to justify that) then the secondary questions such as "was appraiser Menick's testimony admissible?" and "Did Referee Neukom give appellant enough time to work out a sale?" lose all significance. Appellant seeks the benefits of a restraining order pending appeal without having put up a supersedeas. This is contrary to law. Similar rules apply to the fire loss draft. Both appeals should be dismissed.

III

THE FIRST APPEAL

A. THE TRUST DEED WAS IN DEFAULT

The first point made by appellant (App. Br. p. 84, commencing line 10) is that the Trust Deed was not in default. Substantial evidence supporting Referee Neukom's finding to the contrary is as follows:

Exhibit "C" (Trans. p. 85) was prepared by S. J. Arcaris, Western Manager of United, he being in charge of the loan. He stated that it was a correct reflection of United's records (Rep. Tr. 1/15/65 p. 41, lines 11-17). Examination of Exhibit "C" shows that the January 1, 1964 payment of $6,427.00 was made

May 5, 1964, the February 1 payment was made July 27, 1964, and that no payments were made thereafter. Surely this was default, and one long continued -- $10\frac{1}{2}$ months at the time of the January 15, 1965 hearing.

Appellant introduced no evidence on the subject although its counsel claimed it had cancelled checks showing additional payments. It claims lack of due process because it was not given additional time to present this evidence. We suggest there is no substance to this contention for the following reasons:

There is substantial evidence that appellant had more than a reasonable time to put in its evidence that its Trust Deed was not in default. Exhibit "C" was attached as an exhibit to United's replication to the original order to show cause (Trans. p. 69); this was served and filed November 30, 1964. The parties were in court thereafter on December 9th and 29th, 1964 and January 13th and 15th. It was not until the hearing on January 15th that counsel for appellant claimed he did not know that one of the issues before the referee was how much was due on the Trust Deed, and asked for additional time to submit his evidence (Rep. Tr. 1/15/65, p. 57 lines 1-22). The referee properly pointed out that counsel had had Exhibit "C" since the first of December and refused further time. We submit that this is not denial of due process.

Thereafter, in its petition for review filed March 3, 1965 (the first appeal) appellant claimed denial of due process in at least three places; (Trans. p. 239, line 14 to p. 240, line 16; p. 249, lines 11 to 27; p. 253, lines 9 to 28). Following the receipt of this petition for review counsel for United wrote a letter on April 22, to counsel for appellant (Trans. pp. 318-319) criticizing him for making this claim when he had refused to avail himself of the opportunity to present any evidence to United that would indicate that the accounting was incorrect and asking counsel to notify him at once in writing what payment he claimed Calland made on the Trust Deed that United did not give it credit for, or if it had abandoned that contention, let it so state. The answer was a letter from counsel for appellant dated April 12, 1965 (Trans. p. 347) accusing United of bad faith, and stating that Calland's claims would be presented in Court and not in correspondence. It would appear clear that if what counsel for appellant actually wanted was credit for all payments made, that the door was open to him to secure that outside of Court; on the other hand, if what he wanted was further delay, then of course, he was not interested in the offer. As for the question of whether the Trust Deed was or was not in default, the only evidence before the Court established without contradiction that it was in default from March 1, 1964 on -- a full year before the deadline set by Referee Neukom.

Appellant (App. Br. p. 85, line 7) makes the point that "the Referee considered United's incompetent, self-serving letter." This was a letter dated December 4, 1965 written by the attorney for United, circulated to all counsel and a copy sent to the Court, which merely brought the deficiencies on the Trust Deed down to date, and also added a claim for Trustee's fees and Attorney's fees. Counsel for appellant objected that Referee Neukom had taken the letter as evidence and as the basis for his Findings. Referee Neukom replied as follows:

"The Referee: Well, I am taking Mr. Arcaris' testimony today as an amount due and owing. That was his testimony." (Rep. Tr. 1/15/65; p. 56, line 19 to p. 57, line 3). The above exchange between counsel and the Referee establishes that the Referee did not consider the letter of December 4, 1965 as evidence but relied on Mr. Arcaris' testimony as to the amounts due under the Trust Deed.

We submit that the above is substantial evidence that the trust deed was in default.

B. THERE WAS NO AGREEMENT BETWEEN CALLAND AND UNITED AMOUNTING TO AN ESTOPPEL.

The second point of appellant's argument (App. Br. p. 84, line 16) is that:

"The agreement between United and appellant, that United would not foreclose if appellant performed (and it did) was binding and constituted the basis for estoppel against United from foreclosing its Trust Deed." (The wording "(and it did)" is appellant's.)

The record doesn't even come close to supporting appellant's contention in this regard. On April 17, 1964 Calland wrote S. J. Arcaris asking for a six months' deferment of payment on principal commencing April 1, 1964 continuing to and including September, 1964 (Trans. p. 161); Arcaris replied on April 21, 1964 refusing the plan, but giving Calland 90 days to eliminate the delinquencies, if $6,420.00 per month were paid for April, May and June, 1964 (Trans. p. 163). Examination of Exhibit "C" (Trans. p. 85) which Mr. Arcaris stated was a correct reflection of United's records (Rep. Tr. 1/15/65 p. 41, lines 11-17) shows that at the time Calland wrote the letter to Arcaris on April 17, 1964 the payment due January 1, 1964 had not been made. Thereafter on May 5, 1964 one payment of $6,427.00 was made, which paid the payment that was due January 1, 1964. This was the only payment made by Dewey Falcone and Hughes; the only other payment made thereafter was made by Cohen on July 27, 1964 and was applied to the payment that had fallen due February 1, 1964.

This certainly does not show performance by appellant or any facts establishing an estoppel against United.

The Dewey Falcone letter of April 17, 1964, followed by the Arcaris letter of April 21, 1964, both referred to above, must be the so-called agreement between United and appellant referred to, with underlined emphasis by appellant in its brief (App.Br. p. 91, lines 5-10):

> "This has been variously noted supra ie.the agreement between United and appellant, through its 'new' officers after Geiger and Brownlee were ousted. Appellant's statements and allegations of this agreement have never been denied anywhere in the record of this proceeding, or otherwise, by United."

A statement like this doesn't lead to any conclusion: Certainly United hasn't denied the agreement--it is composed of the two letters mentioned. But whether Calland performed is another matter: Exhibit "C" is an absolute denial that it performed, other than the one payment made May 5, 1964. There are two other payments to be made under the Arcaris proposal; neither were made; instead, on June 1, 1964 the property was sold to Cohen, Dewey Falcone brought Cohen into Arcaris' office and asked him to cooperate with him, which he did (Rep.Tr. 1/15/65, p. 46, lines 6 to p. 47, line 7).

We suggest that the underlined statement almost borders on the ridiculous, and is entitled to no more credence than the statement that immediately preceded it:

"The evidence showed no default by appellant."

(App.Br. p. 91, line 4)

C. UNITED DID NOT CREATE ANY RESISTANCE, SUSPICION OR ALARM TO REFINANCING OR SALE ON KON TIKI.

Appellant makes this statement (App.Br. p. 90, line 23).

"The irreparable damage to appellant is obvious from the fact that Parr did not proceed with the escrow. Efforts to refinance or sell met with resistance, suspicion and alarm, created by United, and perpetuated by the Referee."

There is nothing in the record as to why Parr did not proceed to buy Kon Tiki, nor does appellant attempt to point out any evidence to support that statement. Apparently, it is counsel's conjecture. But the record does establish that if, in fact, the image of Kon Tiki was tarnished, it was not created by United but by appellant and its buyer, Cohen. Appellant seeks to put the onus on United by referring to a declaration by Richard Hagler, (Trans. p. 229) filed in support of appellant's application for suspension, pending review, of Referee Neukom's

order removing the restraint against United. This was filed March 3, 1965 (and the part of his declaration appropos the discussion follows):

> "That he has made various efforts to effect refinancing or the sale of the property. *** That in making said efforts and in discussing said matters with various lending institutions, including his employer, he was told by various persons that United had made detrimental statements as to the value, rentability and salability of the property and that these statements had been circulated among the financial institutions and had become quite prevalent and had created a serious obstacle to the refinancing and sale of the property. That accordingly, a special, unique and critical situation exists regarding the property which requires and will require special efforts to overcome the bad image, reputation and conditions of said property so as to effect a fair refinancing or sale of the property. That he has a good faith opinion that if permitted a reasonable time, the length of which depends upon the extraordinary circumstances existing in this proceeding and the condition of said property, he can effect a refinancing or sale

of the property."

The Court will note that this statement is entirely hearsay and being made out of Court in support of a motion was not subject to cross-examination. It certainly is not sufficient evidence to establish the serious charge levelled at United.

However, before discussing the evidence which we believe shows that the bad image originated with Calland or Cohen, not United, it is interesting to note that after this affidavit was executed on March 2, 1965 United was restrained by various orders from foreclosing its Trust Deed until October 19, 1965 (the end of 15 day stay granted by Judge Hill in his order of October 4, 1965) (Trans. p. 484) so it would appear that even though the Courts did grant an additional $7\frac{1}{2}$ month stay, Mr. Hagler was not able to make his refinancing or sale!

In connection with the claim by appellant that it was United that created the resistance, suspicion and alarm, it is significant that the most damaging testimony detrimental to the "image" of the property was brought out by counsel for appellant himself in cross-examining S. J. Arcaris (Rep. Tr. 1/15/65 p. 57, lines 10 to 17):

"Q (By Mr. Falcone): You made many visits to the Kon Tiki during Cohen's occupancy, did you not?

"A. I certainly did.

"Q. Those matters where everything was going on, fights and stabbings and arrest and drunks, all those things were called to your attention, weren't they?

"A. I saw them. They were called to my attention, yes."

It will be noted that the questions asked Mr. Arcaris were leading questions and the derogatory information was supplied in the questions themselves by counsel for appellant.

There is another fact that repudiates appellant's claim that United created the "bad image." On August 31, 1964, the same day that United had Joseph Dunnigan appointed State Court receiver, appellant through its present counsel, filed in the Superior Court of Los Angeles County a lawsuit entitled "The Calland Corporation v. Leonard A. Cohen, et al., being No. 844 870 therein, an action to enforce rescission and to quiet title to the Kon Tiki apartments. A copy of this Complaint is attached to appellant's Debtor's Response to Replication, starting at (Trans. p. 89). The Complaint itself runs from (Trans. pp. 124 to 150 inclusive). Commencing (Trans. p. 140, line 11) appellant levelled serious charges against Cohen and in effect against Kon Tiki itself; in substance appellant

alleged:

> Cohen wasted, destroyed the property and continued to do so; that he converted and removed dishwashers, air conditioners, refrigerators and other personal property; that he so mismanaged and operated the property as the seriously damage its character and reputation as good residential property and has brought it into disrepute by purporting to employ misfits and undesirable characters including alcoholics, criminals and persons of questionable character, to work in and about the property and to associate and deal with the tenants, giving them free apartments and feeding them, so using about 14 apartments without rent or income; permitting the said purported employees, in and about the property, to drink to excess, to engage in brawls and fights, including with Cohen, to violate various ordinances and laws, including the peace and quiet and criminal assaults, one of them stabbing another in an apartment so occupied by them; Cohen caused the tenants to be fearful and apprehensive of their welfare and safety and caused the property to be under almost constant surveillance by the police;

> Cohen had personally, and permitted and directed said employees and others, to mistreat and abuse tenants and unlawfully lock tenants out of their apartments and moved tenants from apartment to apartment without reason against their will and at his whim, and converted the personal property of tenants; an arson-caused fire occurred in one of the apartments resulting in substantial damage to the property; Cohen violated various ordinances and laws including health laws permitting and even causing the violation of criminal ordinances and laws including disturbance and breaches of peace, drunkeness, felonious assaults and stabbing and violent fights.

These charges in a verified Complaint, prepared by present counsel for appellant, spread upon the public records the same day that United had the State Court receiver appointed, would appear to place the blame for any damage to the "image" of Kon Tiki Apartments on appellant rather than on United. On the assumption that the verified allegations are true, and S. J. Arcaris testified he had personal knowledge of some, no one could seriously question the right of United, after serious and repeated defaults on its Trust Deed had occurred, to insist that it be paid its obligation rather than refinance the property to some new buyer, certainly one as ephemeral as Mr. Parr.

D. THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT REFEREE NEUKOM'S VALUATION OF $870,000.00.

Commencing (App. Br. p. 86, line 26) the appellant mounts a determined attack on the Referee's valuation of $870,000.00 (Rep. Tr. 1/15/65, p. 56, lines 8-9). As appellant points out, there were several figures submitted.

There was a Marshall & Stevens appraisal made before the buildings were built, based on the plans and specifications, which fixed the value at $1,125,000.00 (Rep. Tr. 1/15/65, p. 34, line 12).

Leonard A. Cohen, who seems to have been the villain in the piece, and who had little or no qualifications as an appraiser, first testified that he placed a value of possibly a total of $800,000.00 on the property (Rep. Tr. 12/9/64, p. 34, lines 4-5) and then later under prodding of counsel for appellant and confronting him with a cross-complaint he filed in an action brought by the Calland Corporation, stated that his opinion was that the property was worth $1,500,000.00 (Rep. Tr. 12/9/64, p. 36, lines 17-19). Ivor H. Fisher, a witness on behalf of appellant gave several figures, $1,150,000. (Rep. Tr. 1/13/65, p. 10, line 23), $963.755.00 (p. 12, line 4) and $1,200,000.00 (p. 13, line 2), however, it appeared that he had had his own business only eight months (p. 14, lines 9-10) and had never appeared in Court before (p. 14, lines 23-24).

Furthermore, he used a figure for taxes of $14,685.00 when actually the taxes were $21,707.00 as testified to by S. J. Arcaris. When he was asked to give an appraisal with the correct amount of taxes he was unable to do so (p. 101, lines 1-8).

Regardless of the different opinions expressed, the ultimate question before this Court is whether or not there is substantial evidence to support Referee Neukom's findings of $870,000.00. There is such substantial evidence, and it falls into three categories: the sale to Cohen, June, 1964; Mr. Menick's appraisal, and the proposed sale to Charles H. Parr.

1. THE SALE TO COHEN:

Counsel for appellant, kept insisting before Referee Neukom, that Cohen paid $860,000.00 for Kon Tiki. For instance at (Rep. Tr. 12/9/64, p. 17, line 13) he said:

> "Now the insurance company tells you it has bid ($815,000.00) because that's the purchase price Cohen agreed to pay. That isn't true. That isn't what he agreed to pay. It is $860,000.00."

It is true Cohen agreed to pay $860,000.00 but this included some $45,000.00 of furnishings, and furniture which was being purchased on contract. In other words, he and Cohen

assumed that Cohen would pay those contracts, but he only agreed to pay $815,000.00 for the real property. See (Trans. p. 133, lines 13-23) where it is alleged in the verified Complaint filed by counsel for appellant on behalf of appellant.

> "* * * on or about June 1, 1964 plaintiff agreed to sell to defendant the property * * * for the price of $815,000.00 plus defendant's assumption and payment of all of the furniture and fixture leases and conditional sales contracts of the estimated balance of $46,381.03 * * * ."

So, Referee Neukom had evidence of an actual sale of the property covered by the Trust Deed for $815,000.00 approximately six months before.

2. APPRAISER A. S. MENICK'S TESTIMONY:

Mr. Menick's testimony appears (Rep. Tr. 1/15/65, pp. 4-31). He appraised the property at $850,000.00 (p. 6, lines 21-22). Mr. Menick was appointed by Referee Neukom (p. 5, lines 11-13). He could hardly be accused of being prejudiced in favor of one party or the other; his qualifications were substantial; he's been appraising both real and personal property in the United States District Courts for the past 27

years (p. 4, lines 13-15).

Mr. Menick was an independent appraiser appointed by the Court (p. 6, lines 15 to 16) by the cost approach method he reached a valuation of $875,000.00 but by the income approach he reached a valuation of $861,450.00 reduced that to $850,000.00 because of the vacancy factor being greater than normal and because the conditions of the apartments, a good many of them being in an unrentable condition at the time he looked at them (p. 16, line 25 to p. 17, line 8). Mr. Menick had lived in the vicinity since 1918, was 69 years old, and since 1952 or 1953 when he started to number them he had made approximately 3,000 appraisals as an appraiser with the various District Courts and Bankruptcy Courts; he had appraised apartment houses such as this one before.

Although counsel for appellant attempted to belittle Mr. Menick, his qualifications and his efforts, this Court will find on reading his entire testimony that he gave the appearance of a careful witness, well versed in practical appraising, and that his appraisal of $850,000.00 is entitled to great weight.

3. THE PROPOSED SALE TO CHARLES H. PARR:

The proposed sale to Mr. Parr was for $900,000.00, Mr. Stein, the Broker, said he would charge $30,000.00 in

commission. Referee Neukom subtracted the $30,000.00 from $900,000.00 arriving at the net figure to the estate of $870,000.00. He fixed that figure as the top value of this particular property (Rep. Tr. 1/15/65 p. 56, lines 8-16).

We submit that these three factors; the sale to Cohen in June, 1964 for $815,000.00, the appraisal by the Court-appointed appraiser A. S. Menick of $850,000.00 and the proposed sale to Parr with a net of the estate of $870,000.00 is substantial evidence supporting Referee Neukom's determination that the Kon Tiki had a value of $870,000.00.

E. REFEREE NEUKOM WAS NOT ARBITRARY IN SETTING MARCH 4, 1965 AS THE CUT-OFF DAY.

Scattered throughout appellant's brief, and it is stated in a half dozen different ways, is the claim that Referee Neukom was arbitrary in fixing March 4, 1965 as the cut-off date for the removal of restraints against United in its attempts to foreclose its Trust Deed. This brings into focus whether or not there is any substantial evidence in the record to support Finding XI, (Trans. p. 210) as follows:

> "That it is true that the failure of the debtor to cure the default which has existed on United's first Trust Deed since March 1, 1964 has continued for an unreasonable length of time and

that the right of United to foreclose its first deed of trust has been delayed for an unreasonable length of time and that it would be unjust and inequitable to restrain United further beyond the date of March 4, 1965 at 12 o'clock noon."

Coupled with this and properly considered together; is the next Finding, XII as follows:

"That it is true that the debtor has undertaken certain proceedings to consummate a sale of the debtor's real property to one Charles H. Parr at a figure stated to be more than sufficient to pay in full all sums due and owing under United's first Trust Deed and all other secured and unsecured creditors of the debtor. That it is true that the period of time between January 15, 1965 and March 4, 1965 at 12 o'clock noon is a period of time reasonably sufficient to allow the debtor to consummate said sale."

The Court found on the basis of the uncontradicted Exhibit "C" (Trans. p. 85) in Finding VII, (Trans. p. 208) that the December 1, 1963 payment on United's Trust Deed was not made until March 6, 1964; that the January 1, 1964 was not made until May 5, 1964; that the February 1, 1964 was not made until July 27, 1964; and that the appellant was in default

from March 1, 1964 to date of the findings, February 17, 1965. In other words, the last payment which United had received was made on July 27, 1964 from Leonard Cohen and this was applied to the February 1, 1964 payment. The Court found that Exhibit "C" was a correct recapitulation of the payments made on the Trust Deed (Trans. p. 208, lines 23-28).

We consider the following to be substantial evidence to support Referee Neukom's findings both as to unreasonable delay and as to a reasonable length of time to work out the Parr deal.

1. THERE WAS UNREASONABLE DELAY IN CURING DEFAULT.

An analysis of Exhibit "C" demonstrates that almost from the first the payments were delinquent. The second payment was more than two months delinquent, the fourth payment was more than three months delinquent, the fifth, three months, the sixth, two months, the seventh, two months, the eighth, three months, the November 1 payment was three months delinquent and the December 1, 1963 payment was not made until March 6, 1964. In April, payments toward the taxes were made but no payments on the principal. It was in this context that the exchange of letters between Dewey Falcone and S. J. Arcaris took place (Trans. pp. 161-163).

In other words, not withstanding the bad payment record, United was willing to postpone the January, February and March payments for 90 days providing the April, May and June payments were made on time. And from the substance of the Arcaris letter apparently there was a second Trust Deed deal being contemplated that would make this arrangement feasible. We see nothing about this that would indicate a "pound of flesh" attitude on United's part. However, Falcone and Hughes did not avail themselves of that offer; they made only one payment on May 5, 1964, which was applied to the January 1, 1964 payment. The sale to Cohen then came into the picture as of June 1, 1964. Dewey Falcone, President of Calland brought Cohen into S. J. Arcaris' office and asked Mr. Arcaris to cooperate with him, and agreement was made to allow Cohen to pay the July payment in full and thereafter pay only interest for five months. Testimony establishing this appears in (Rep. Tr. 1/15/65, p. 46, line 10 to p. 47, line 9) as follows:

> "Q. By Mr. Falcone: Now when you accepted the notice of rescission by Falcone's office rescinding the Cohen transaction, I came there with the people I just mentioned forthwith; and I asked whether you would cooperate with The Calland Corporation, and you told me that you would not consider Calland at all but you

preferred Cohen; is that right?

"A. By S. J. Arcaris: No, I told you --

"Q. Didn't you say you preferred Cohen?

"THE REFEREE: Please permit him to answer the question.

"THE WITNESS: Mr. Falcone, I told you I could not deal with The Calland Corporation at that time because I was under written agreement with Cohen. This man you brought in asked me to cooperate with --

"Q. Did I bring him?

"A. Mr. Dewey Falcone did.

"Q. You made an agreement --

"A. Yes.

"Q. -- giving him the privilege to pay only interest?

"A. That's right.

"Q. And did he live up to that agreement?

"A. Just a minute. He was given the privilege to pay the full amount in July and then interest from there on for about five months.

"Q. All right. The escrow was not closed until December."

Further examining Exhibit "C" (Trans. p. 85) we see that when Mr. Arcaris made this agreement with Cohen about

June 1, 1964 to provide that July's payment be made in full and thereafter pay only interest for five months, the February, March, April, May and June payments had not been made; the last one he received had been $6,427.00 on May 5, 1964 and this had been applied to the January 1, 1964 payment. Exhibit "C" reflects that the payment due from Cohen on July 1, was not made until July 27, and that thereafter there was neither interest or principal paid on this obligation. When Calland and Cohen began having difficulties between themselves, and sending notices to the tenants not to pay the other, and with drunkeness, fights and brawls taking place at Kon Tiki, the State Court receiver was put in August 31, 1964. We feel that the above facts and circumstance constitute substantial evidence in support of Referee Neukom's findings:

> "that the failure of the debtor to cure the default which has existed on United's first Trust Deed since March 1, 1964 had continued for an unreasonable length of time and that the right of United to foreclose its first deed of trust had been delayed for an unreasonable length of time and that it would be unjust and inequitable to restrain United further beyond the date of March 4, 1965 at 12 o'clock noon."

2. REFEREE NEUKOM GAVE CALLAND A REASONABLE TIME TO WORK OUT A SALE:

There is substantial evidence in support of Referee Neukom's Finding XII: "that the period of time between January 16, 1965 and March 4, 1965 at noon is a period of time reasonably sufficient to allow the debtor to consummate said sale."

The sale to Parr developed this way:

At the hearing of December 9, 1964 before Referee Neukom, Hubert Laugharn, one of the attorneys for appellant at that time, stated to the Court:

> "I say this: I am informed by the President of the company that he has been negotiating for the sale of the property and that he has convinced the parties that this Court can give good title." (Rep.Tr. 12/9/64, p. 59, lines 23-26).

The question was then discussed as to allowing appellant a reasonable time to finalize the offer. In connection with this the Referee called S. J. Arcaris to the stand to determine the amount due at that time; Mr. Arcaris stated the amount to be at least $723,320.35 (p. 63, line 12) and then, after Mr. Arcaris stated that Exhibit "C" was a true reflection of the information contained in the books and records of United, the Referee asked

him this question:

"Q. You don't need to answer this question, but if this loan was repaid to you say within six weeks would you be willing to forego possibly some of these penalties? You don't need to answer that unless you --

"The Witness: I'll answer it, I think we would, yes.

"Q. (by Referee) You don't want the property?

"A. We certainly do not. We are not in the real estate business.

"Q. Would you like to put this money into circulation?

"A. Absolutely, that is our only concern." (p. 63, line 15 to p. 64, line 14).

The Referee after further colloquy about the continuance stated:

"I feel this way: if this matter is continued to Monday, December 28, and if by that time there has not been brought forward something which indicates a sale in substantially the amount as is indicated, I would then feel inclined to lift all restraints and let the foreclosures go as they might.

" I don't know whether there will be any such offer produced but I feel inclined to accept as of today the statements that have here been made and the testimony that the sums indicated are due and owing.

" I feel inclined to continue this hearing mainly the restraining orders until after the hearing on Monday, December 28." (p. 68, lines 6-18).

After further discussion this took place:

"The Referee: I could have it on Tuesday, December 29 at 2:00 p.m.

"Mr. Falcone: Your Honor

"Mr. Laugharn: Did the Court fix the hour?

"The Referee: 2:00 p.m.

"Mr. Falcone: The debtor appreciates this and thanks you for it." (p. 69, lines 10-16).

And further on:

"The Referee: Surely in twenty days if you have anybody interested they are either going to say yes or no.

"Mr. Falcone: Right, Right.

"The Referee: I don't feel I should restrain

a foreclosure of this size indefinitely." (p. 70, lines 14-19).

And at the conclusion of the hearing

"The Referee: Very well, we all agree that this matter is continued to the afternoon at 2:00 p.m., Tuesday, December 29. All restraining orders are to remain in force and effect until after the hearing then to be conducted. We are in recess." (p. 72, lines 2-8).

The next hearing was on December 29, 1964 at 2:00 p.m. At the commencement of the proceedings, Mr. Laugharn, one of the then attorneys for appellant stated:

"Mr. Laugharn: If the Court please I don't know if you recall, but it was to this continuance the Court directed that there be the showing of the possibility of the sale of this matter. It went over on that condition." (Rep. Tr. 12/29/64, p. 4, lines 8-11).

Mr. Dewey Falcone, President of Calland then told Referee Neukom that he had an offer to purchase by Mr. Charles H. Parr, that Mr. Parr was represented by a broker by the name of Robert Stein who was familiar with the property, looked at the property and that time gave me an offer to purchase, (At a later hearing on January 13, 1965, it developed that Stein had

actually never seen the property but that he thought that Mr. Parr had seen the property, but he wasn't too sure (Rep. Tr. 1/13/65, p. 45, lines 2-6). Mr. Dewey Falcone stated the purchase price at $900,000.00 and that $5,000.00 had been deposited in escrow. He presented a copy of the escrow instructions and the Referee then asked counsel for United what their position was? Counsel replied:

> "Mr. Kelly: Well, your Honor, we start with the idea that United doesn't want the property. All we want is the money. Now we realize that this so called escrow looks as if it is a deal, but there are two or three escape clauses it in. For instance, one is subject to the examination of the operating expenses statement on the property. If the proposed buyer does not like the looks of the operating expenses, he can take his $5,000.00 and walk away." (p. 6, lines 1-16).

After further discussion counsel for United made this statement:

> "But if the Debtor believes that it can work out a deal here and wants to take a try at it, we don't want to be obstructionists except that we think that some reasonable time limit, and the time that I was speaking of around the courtroom before your Honor took the Bench, was the time

of 45 days. Mr. Falcone said he thought he would not have any trouble reducing this 90-day escrow to 30 days to give them the time to try to work out all these various conflicting claims with the understanding that if at the end of 45 days he had not completed this proposal, that we would then go ahead and sell." (p. 8, lines 7-17).

The Referee thereupon continued the restraining orders to remain in effect until Wednesday, January 13, 1965 at 2:00 p.m. (p. 23, lines 3-5).

A discussion of what additional time would be necessary to work out the sale covers several pages of the Reporter's Transcript of the January 13 hearing. Counsel for appellant stated that 45 or 60 days would not be unreasonable (p. 29, line 11) and further on that he would stipulate that if Referee Neukom would give the debtor 45 days or "a reasonable time 45, maybe 50, maybe 60 days, at the end of that time if it was not consummated then Your Honor could do what he pleases about it. We would abide by Your Honor, subject to review, of course." (p. 34, lines 5 to 11). Later on Mr. Stein, the Broker, consulted with counsel for appellant, and counsel for appellant then stated to the Court "Mr. Stein suggests 60 days, if possible; if not, 45 days." (p. 36, lines 13-14). Counsel for appellant after other questions, asked Mr. Stein:

"Q. By Mr. Falcone: Do you want reasonable time to consummate this sale?

"A. I would like it, sir, yes, sir.

"Q. How much time is reasonable time?

"A. 45 days was suggested here, yes, sir." (p. 39, lines 12-16).

On redirect examination, counsel for appellant questioned Mr. Stein further in this regard:

"Q. By Mr. Falcone: You are not limiting yourself just to refinancing? You are going to try to do everything you can to work this out for Mr. Parr's purchase?

"A. I would like to make a deal, yes, sir.

"Q. Do you feel reasonably certain if given 45 days you can do so?

"A. I believe so, sir." (p. 64, lines 11-17).

In further discussion of the request for further time Mr. Laugharn, one of the attorneys for appellant, made this statement:

"This case must reach its end in some manner. There is nothing in this case unless the debtor can bring forward a sale all the way down the line. On the other hand, being in the same shoes as Mr. Kelly in these two matters, I appreciate his concern. After all, all he has

asked here is expedition and a final result, and to have it, when it comes to a final result, with either a payoff or foreclosure." (p. 109, lines 6-12).

The January 13 hearing was then continued to January 15, at 10:00 a.m. (p. 114, lines 3 and 4).

Appraiser A. S. Menick, appointed by Referee Neukom, was heard on January 15, 1965; S. J. Arcaris brought the deficiency down to date, and Referee Neukom continued the restraint until March 4, 1965 to give appellant an opportunity to work out the sale. The substance of the above evidence demonstrates that appellant's claim that Referee Neukom did not give it a reasonable time to work out a sale is without merit. Appellant asked, on January 13, for 45 days; Referee Neukom gave it 50 days. On the 49th day Judge Clark restrained United further until Referee Neukom's order could be reviewed. Judge Hill affirmed the Referee on October 4, 1965, and granted an additional 15 day stay. The end result was that appellant, after having assured Referee Neukom that if it were granted 45 cays and at the outside 60 days, it would be able to work out the sale, in fact, by a series of restraining orders, was actually given 279 days before the restraint against foreclosure was actually lifted. We feel it is self-evident that if Mr. Parr, in good faith, ever intended to buy this property, he had plenty of time to go through with the deal. Furthermore, the fact

that he did not go through with the deal in the succeeding 279 days leads to the practical conclusion that Referee Neukom was right when he held that 50 days was a reasonable time. Figuring it another way: Mr. Parr's deal went into escrow December 28, 1964 (Rep.Tr. 12/29/64, p. 5, lines 14-17) so that when Referee Neukom finally fixed March 4, as the cut-off date, appellant actually has been given 65 days within which to complete the escrow. Certainly there was not an unreasonable time under the circumstances.

It is submitted that all of the foregoing is substantial evidence supporting Referee Neukom's Finding XII (Trans. p. 210). "That the period of time between January 15, 1965 and March 4, 1965 at noon is a period of time reasonably sufficient to allow the debtor to consummate said sale."

While it would be elementary that each case must be decided on its own facts and circumstances, Referee Neukom's ruling is not inconsistant with adjudicated cases.

A 9th Circuit case in many respects like the present one is Mundt v. Home Fed. Savings & Loan Assn., (9th Cir., 1965), 349 Fed. 2d 938. Many facets of the Mundt case are similar to ours. The lender Home Federal, after repeated defaults, filed a notice of foreclosure; one day before the sale was to have taken place the debtor initiated Chapter XI proceedings and the foreclosure was restrained; after repeated hearings and a long period of time, the Referee vacated the

restraining order, but reinstated it pending review. The debtor raised constitutional questions and claimed abuse of discretion by the Referee in terminating the restraining order. While few facts are recited in the opinion the Court held that there had been no violation of the debtor's rights and no abuse of discretion by the Referee.

The Mundt case had an interesting aftermath in that the same property found its way into the California State Courts in Zaluskey v. Mundt, (1966) 240 Cal. App. 2d 713. The opinion in Zaluskey indicates that after the Referee vacated the restraining order against foreclosure, the District Court affirmed the Referee's order, and denied the Mundt's application for rehearing and for stay of execution pending appeal to the Ninth Circuit. The Zaluskeys bought the property in a sale by the Trustee under the Deed of Trust about two months after the order was vacated and while the appeal was going up to the Ninth Circuit. The Zaluskeys brought the unlawful detainer action against the Mundts, who were still in possession, somewhat as United has been compelled to bring a quiet title action against the appellant and others in order to get a title policy. (See seventh appeal pending herein).

The Court in Zaluskey made this statement: "The decision of the referee, however, to vacate the order restraining enforcement of the secured lien was as discretionary as it was initially to enjoin such proceeds.", citing In re Holiday

Lodge, Inc. (7th Cir., 1962) 300 Fed. 2d 516.

Holiday involved an appeal not because a restraining order had been dissolved, but because it had been continued. In that case, which involved a foreclosure of a Trust Deed, the Referee had refused to continue the restraining order in a Chapter XI proceeding after six months; a review was taken to the District Court and the District Court held a de novo hearing and reversed the Referee and continued the restraining order in effect. The holder of the trust deed took an appeal to the Seventh Circuit contending that, with the exception of discretion to grant short preliminary restraining orders in order to give the debtor the time to work out an arrangement, the Bankruptcy Court had no jurisdiction to grant a restraint against a secured creditor. The Seventh Circuit reversed the District Court, terminated the restraint, and gave an interesting discussion of the nature of the Chapter XI proceedings. The Court held that the Chapter XI proceedings are only for the purpose of protecting the unsecured creditors and are not intended to be used as a vehicle for changing or modifying or restraining the rights of the secured creditors.

We think that this was the point of digression between Mr. Hubert Laugharn, who acted as one of the attorneys for appellant in the preliminary stages of the proceedings before Referee Neukom, and Mr. Falcone, who appeared also and who later took over the entire matter on behalf of the appellant. We

believe it is evident from the remarks of Mr. Laugharn heretofore mentioned (Rep. Tr. 1/13/65, p. 109, lines 6-12), that he recognized the limitations of the nature of Chapter XI proceedings as it related to the jurisdiction of the Referee to continue for an unreasonable length of time the restraints against the holder of the first Trust Deed in the enforcement of its rights. Obviously, present counsel for appellant has never recognized this and still asserts the contrary vehemently, seeming to attempt to persuade this Court that the nature of the Chapter XI proceedings is such that the secured creditors may be indefinitely restrained from asserting their rights, if thereby, the unsecured creditors may possibly be helped.

Zaluskey is also interesting on the question of mootness. It held that by the time the Trustee (under the trust deed) sold the property, the Federal Bankruptcy Court had withdrawn its jurisdiction over the res and jurisdiction had reverted to the State Courts. The Court further held that it appeared that the Mundts' failure to obtain a stay pending appeal made the question moot, citing Brill v. General Industrial Enterprises, supra.

IV

THE FIFTH APPEAL

The fifth appeal challenges the order of Referee Neukom made April 14, 1966 quieting title in United to a fire insurance draft for $2,380.30. The fire had occurred August 5, 1964 (before United instituted the State Court receivership on August 31, 1964) and at the time of the hearing on the motion the premises were still unrepaired (Trans. p. 724, lines 22-28).

There is substantial evidence to support Referee Neukom's order that United was entitled to the draft.

1. Exhibit U2 introduced at the hearing of March 31, 1966 was a rider attached to the insurance policy of General Accident-Potomac together with the Lender's Loss Payable Endorsement. This rider specifically insured both Kon Tiki and United as their interests might appear.

2. Exhibit U1 introduced at said hearing was a photo-print copy of United's Deed of Trust dated January 10, 1963. As a matter of convenience, rather than examine the exhibit itself, this Court will find the specific provision involved at (Trans. pp. 745 and 746). In substance the Trust Deed provided that the borrower was required to maintain fire insurance; it also provided:

"The amount collected under any fire or other insurance policy may be applied by Beneficiary upon any indebtedness secured hereby and in such order as Beneficiary may determine, or at the option of Beneficiary the entire amount so collected or any part thereof may be released to Trustor."

3. The Findings (Trans. p. 725, lines 7-11) reflect that on October 21, 1965 there was due to United the sum of $772, 151.31 and that United bid in the property for $725,000.00 leaving a deficiency of $47,151.59.

We submit that the above is substantial evidence in support of the Referee's order that United was entitled to the insurance draft. Accordingly, United is entitled to an affirmance of the fifth appeal.

V

THE STATUS OF JOSEPH DUNNIGAN JR. AS STATE COURT RECEIVER.

At several places in its brief appellant criticizes the motives, ethics and tactics of United in this proceeding in connection with the appointment of Joseph Dunnigan, Jr. as State Court Receiver. For instance, appellant says (App. Br. p. 13, lines 12-24):

"Dunnigan was appointed state receiver without disclosing to the Court that he was the agent and representative of United in said loan transaction and interested in said action. He was disqualified as a matter of law to act as receiver. (CCP 566) This was not disclosed to the Court when it appointed Dunnigan receiver. Another Judge, Judge Alfred Gitelson, in a later hearing on October 30, 1964, on said matter raised by appellant who had appeared therein, requested Dunnigan to resign and he did in open Court. Judge Gitelson stated that said recignation was accepted 'effective upon the appointment by the Court of his successor.' There has been no successor appointed by the Court."

And again:

". . . United's action in the Superior Court, its fraud in obtaining the appointment of its agent Dunnigan as the receiver . . ." (App. Br. p. 91, lines 19-21).

This type of argument is difficult to answer because it is outside the record in this case. It is simply the version of counsel for appellant as to what happened in certain proceedings before a judge in the Superior Court. The fact of the matter is

that there are final orders in that State Court proceeding that represent the ultimate decision of Judge Gitelson on the points raised by appellant and those findings are directly contrary to appellant's claim that Dunnigan was disqualified from acting as receiver and that United committed a fraud on the Court in having him appointed. We feel these statements should be answered, so we will state what the substance of Judge Gitelson's order was, and offer, if this Court feels that the matter is of sufficient importance, to secure a certified copy of the findings of fact and conclusions of law, hereafter referred to, so that the record may be augmented. In action #844407, in the Superior Court of Los Angeles County entitled United Insurance Company of America v. The Calland Corporation, et al., Joseph Dunnigan, Jr., on November 29, 1965, filed his second and final account and report as receiver and petition for distribution and discharge. On December 6, 1965, Calland, through its present counsel, filed extensive objections alleging among other things that Joseph Dunnigan, Jr. was disqualified to act as receiver and that the appointment of Joseph Dunnigan, Jr. as receiver was fraudulently obtained; all on the ground that he was allegedly an agent of United. In findings of fact and conclusions of law, dated January 5, 1966, dictated and signed by Judge Gitelson and filed in that action, Judge Gitelson specifically found that the allegations in the objections filed by Calland that Joseph Dunnigan was disqualified

and that his appointment was obtained by fraud were untrue and in the conclusions of law concluded specifically as follows (p. 5, lines 11-12):

"IV

"That Joseph Dunnigan, Jr. was not disqualified to act as receiver herein."

and at (p. 5, lines 18 and 10):

"VII

"That the appointment of Joseph Dunnigan, Jr. as receiver was not fraudulently obtained."

Appellant took an appeal from the order entered on these findings of fact and conclusions of law, but the same was dismissed October 25, 1966 by Division 1 of the District Court of Appeals, Second Appellate District, for failure to comply with the Rules on Appeal.

We suggest that appellant's good faith in making these serious charges against United is very questionable, when the final order entered in those proceedings is directly contrary to the statements made by appellant.

CONCLUSION

This was a routine foreclosure of a Trust Deed after the operation of the property had turned into a shambles. The only thing unusual about it is the extraordinary delaying tactics

of counsel for appellant. Although it appeared to us that appellant and its counsel were accorded every consideration at every stage, the entire proceeding was surcharged with accusations by counsel for appellant of misfeasance and/or malfeasance and/or overreaching and/or bad faith and/or fraud and/or bias and prejudice. Everyone from the Referee, to all counsel, and all adverse witnesses, came in for their share for this abuse. Even United States District Judge Irving Hill was presented with an affidavit of bias and prejudiced totally unjustified and subject only to the interpretation that it was an attempt to delay the proceedings (Trans. p. 396). Counsel for appellant's fifteen requests for extensions of time to file his opening brief is certainly some sort of record.

We suggest that either due to bad management, or bad advice, appellant found itself in a financial predicament from which it was unable to extricate iteslf and lost its property by foreclosure after having been given every opportunity to sell or refinance the property. We suggest that not only are the first and fifth appeals moot, but that appellant has totally failed to point out in any respect whatever where error occurred. We ask that the judgments appealed from be affirmed.

Respectfully submitted,

EUGENE KELLY

Attorney for Appellee
United Insurance Company of
America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Eugene Kelly

EUGENE KELLY